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U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
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Services



FILE: WAC 02 080 51850 Office: CALIFORNIA SERVICE CENTER Date:

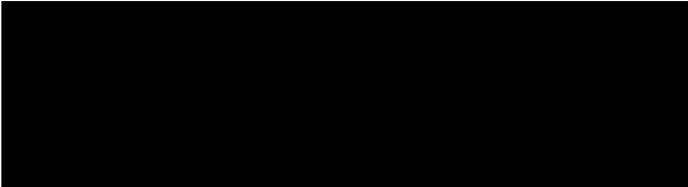
IN RE: Petitioner:
Beneficiary:



MAR 29 2004

PETITION: Immigrant Petition for a Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy**

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a travel agency. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional information and asserts that the director failed to adequately review the petitioner's tax return and other financial information.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) also provides in pertinent part:

(2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon the petitioner's continuing financial ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is January 13, 1998. The beneficiary's salary as stated on the labor certification is \$4,338.97 per month or \$52,067.64 per year based on a 40-hour week. The record indicates that the petitioner was established in 1991 and is organized as a corporation.

As evidence of its ability to pay, the petitioner initially submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2000. It reveals that the petitioner files its taxes based on a standard calendar year. The information set forth on the petitioner's 2000 corporate tax return reflects that it declared an ordinary income of -\$738.96. Schedule L of the tax return shows the petitioner's current assets and current liabilities. Current assets were \$102,366 and current liabilities were \$65,951. The difference of \$36,415 is the value of the petitioner's net current assets at the end of the year. CIS will consider net current assets in addition to net income because it reflects the amount of liquidity that a petitioner has as of the date of filing. It represents the level of cash or cash equivalents that would reasonably be available to pay the proffered salary during the year covered by the Schedule L balance sheet. Here, neither the petitioner's ordinary income -\$738.96, nor its net current assets of \$36,415 were sufficient to cover the beneficiary's wage offer of \$52,057.64.

The director requested additional evidence from the petitioner on March 28, 2002. Along with documentation of the beneficiary's past training, the director instructed the petitioner to submit evidence relating to its ability to pay the proffered wage. The director requested annual reports, federal tax returns, or audited financial statements consistent with the regulatory requirements set forth at 8 C.F.R. § 204.5(g)(2). The director also requested the petitioner to submit its 1998, 1999, and 2001 income tax records.

Counsel's July 2002 response included evidence relating to the beneficiary's educational background as well as copies of the petitioner's 1998, 1999, and 2000 corporate tax returns. Counsel also included a letter from the petitioner's president identifying the four officer/shareholders of the petitioning corporation.

It is specifically noted that the 2000 corporate tax return submitted with this response and subsequently appearing in other submissions to the record appears to have been altered from the one originally submitted with the petition. Both bear the same dates and signatures, but the figures for line 7, "compensation of officers" and line 8, "salaries and wages" have been changed. The originally submitted tax return showed no officer compensation and \$80,320.00 in salaries and wages. Subsequent 2000 corporate tax returns offered to the record reveal that the officer compensation is now \$65,200 and the salaries and wages are \$15,120. No explanation for this discrepancy appears within the petition's documentation. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592.

The director issued a notice of intent to deny on August 20, 2002, reflecting that it had not received a response from the petitioner. The director again requested tax records. Counsel subsequently resubmitted copies of the relevant corporate tax returns for 1998 through 2001 and partial copies of the individual tax returns of two of the officer/shareholders for 1999, 2000 and 2001. Counsel requested that the net worth of these shareholders should be considered in support of the petitioner's ability to pay the proffered salary because the petitioning business is an S corporation.

The petitioner's 1998 corporate tax return reflects that it declared \$1,232.10 as ordinary income. Schedule L shows that the petitioner had \$29,737.50 in current assets and \$35,314.40 in current liabilities, resulting in -\$5,576.90. Both its ordinary income and its net current assets were insufficient to meet the beneficiary's proposed salary for that year.

The 1999 corporate tax return shows that the petitioner had \$5,034.67 in ordinary income. The difference of \$20,198 as its net current assets reflects the difference between its current assets \$43,255 and the current liabilities of \$23,057. The petitioner could not pay the proffered wage out of either its ordinary income or its net current assets for this year.

The 2001 corporate tax return reveals that the petitioner declared -\$17,898 as ordinary income. Schedule L shows the current assets at \$56,535 and current liabilities at \$30,021, resulting in \$26,514 in net current assets. Both the ordinary income and net current assets were far short of the beneficiary's wage offer of \$52,067.64.

The director denied the petition, determining that the petitioner's level of ordinary income in each of the relevant years was far short of the required funds needed to cover the beneficiary's wage offer and establish the petitioner's continuing ability to pay as of the visa priority date. The director rejected counsel's proposition that the individual shareholders' personal assets be considered in its determination. We agree and would also note that the

petitioner's net current assets for each of the pertinent years fail to support its ability to pay.

On appeal, counsel resubmits copies of the petitioner's corporate tax returns and the individual financial statements and tax returns of the officer/shareholders. Counsel renews his contention that the personal net worth of these individuals should be included in the examination of the petitioner's ability to pay the beneficiary's salary. Counsel argues that the structure of a Sub-Chapter S corporation permits the inclusion of the net worth of the shareholders as part of the examination of the petitioner's ability to pay. We disagree. The major differences between S corporations and regular corporations are that S corporations are not taxable entities, are limited to one class of stock, and have no more than 35 shareholders, which must not be either partnerships or corporations. While agreeing with counsel that "piercing the corporate veil" to reach individual assets of officers or shareholders is a widely recognized theory to redress corporate wrongs, it still remains an exception to the basic principle that corporations are separate and distinct legal entities from its owners and shareholders. Thus, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980); *Matter of Tessel*, 17 I&N 631 (Act. Assoc. Comm. 1980). As noted in *Sitar v. Ashcroft*, (2003 WL 22203713 (D. Mass)), "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel also argues that the depreciation expense should also be added back to the petitioner's net income because it is a non-cash deduction. In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Depreciation represents the decreased value of assets of a business and is considered to be a relevant factor in determining the financial viability of the business. It will not be added back to a petitioner's net income. *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537.

Counsel's argument that the officer compensation listed on line 7 of the corporate tax returns should be added back to its ordinary income is also unpersuasive. Notwithstanding the previous discussion of the discrepancies noted on the petitioner's 2000 tax return and the questions it raises as to the reliability of the petitioner's figures, officer compensation represents cash already expended. As an asset of the individual officer, as noted above, it will not be included in the consideration of the petitioner's ability to pay the proffered wage.

Counsel finally argues that the beneficiary's potential to generate income should be included as part of the examination of the petitioner's ability to pay the proposed salary, citing *Masonry Masters Inc. v. Thornburgh* 875 F.2d 898 (C.A.D.C. 1989). That case primarily held that INS [n/k/a CIS] had erred in insisting on evidence of the petitioner's ability to pay anything more than the prevailing wage at the time of the application for labor certification. At the conclusion of the decision, the court opined that CIS' focus on requesting an income statement from the petitioner appeared to assume that the worker would contribute nothing to the

income. The court noted that it would be helpful if CIS revealed its theory as to how it assessed the ability to pay a wage. In this case, counsel has mentioned the beneficiary's two year employment experience as a travel consultant and suggested that he will help the petitioner operate more efficiently, but has suggested no specific criterion for the evaluation of such a contribution to earnings. Absent solid evidence with which to calculate the beneficiary's potential contribution to the petitioning business, it remains essentially speculation.

Accordingly, based on the evidence contained in the record and after consideration of the information and arguments presented on appeal, we cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered as of the priority date of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.